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DEPARTMENT OF STATE
ASSISTANT SECRETARY

To: The Secretary
Through: S/S *30*
From: EUR - Foy D. Kohler *fax* *3*
Subject: Relationship between German Federal Republic and Berlin

(Tab C)

You have requested, in connection with our reply to the Soviet note protesting the proposed establishment of a West German radio station in Berlin, to be further informed regarding the relationship between the German Federal Republic and West Berlin.

This relationship cannot be simply defined, for it is without parallel or precedent. Berlin remains an area under Allied military occupation, but the Three Powers have permitted West Berlin to exercise the maximum of self-government compatible with the city's special status. In this connection, they have also permitted an increasingly close association of West Berlin with the Federal Republic while at the same time insisting on maintaining the constitutional separateness of the two areas. The complexities of the relationship are described in more detail in the paper at Tab A.

Certain problems which have arisen in connection with the relationship of the Federal Republic and Berlin are summarized in the paper at Tab B.

Concurrences

GER
Mr. Hillenbrand

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Mr. Hager

L/EUR
Mr. Kearney

Attachments:

1. Relationship of German Federal Republic and Berlin (Tab A).
2. Problems of Berlin-Federal Republic Relations (Tab B).

Copies to:

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RELATIONSHIP OF GERMAN FEDERAL REPUBLIC AND BERLIN

Complexity of Relationship

The relationship between the German Federal Republic and Berlin is sui generis. With respect to culture, social organization, economy, citizenship, jurisprudence, and type of administration the two are homogeneous parts of the whole of "free" Germany. Those divisive and separatist developments which have increasingly isolated the Soviet-controlled area from the rest of Germany have had a minimal effect on West Berlin, and West Berlin's ever closer association with the new dynamic Germany of the Federal Republic has strengthened the bonds based on their common traditions. Constitutionally, however, Berlin is separate from the Federal Republic. The political relationship between the two is understandable only as an accidental product of the postwar history of Germany.

Status of Berlin

Berlin's status in international law remains today what it became following the unconditional surrender of the German Reich in 1945 -- that of an area under military occupation by the Four Powers.

The Protocol on the Zones of Occupation in Germany and the Administration of Greater Berlin, in its final form, provides that "Germany, within her frontiers as they were on the 31st December, 1937, will, for the purposes of occupation, be divided into four zones, one of which will be allotted to each of the Four Powers, and a special Berlin area, which will be under joint occupation by the Four Powers." The Protocol then specifies the geographical boundaries of each zone and provides for the division of the territory of Greater Berlin, which "will be jointly occupied by the armed forces" of the Four Powers, into four parts. Paragraph 5 of the Protocol provides that "An Inter-Allied Governing Authority (Kommandatura) consisting of four Commandants, appointed by their respective Commanders-in-Chief, will be established to direct jointly the administration of the 'Greater Berlin' area."

The status of Berlin as an occupied area has not been changed by the 1949 division of the city (which, however, suspended four-power administration of the city as a whole and left West Berlin as an area under tripartite administration), by the limited association of Land Berlin with the Federal Republic since 1949, by the Federal Republic's acquisition of sovereignty in 1955, or by the Soviet Union's creation of the puppet "German Democratic Republic."

Constitutional Provisions and Allied Reservations

When the Federal Republic was created in 1948-49, the question immediately arose what relationship it would have with the municipal government which had been established in Berlin. As a result of German desire for the fullest participation of Berlin in the new government, the Basic Law of the Federal Republic, drafted by a Parliamentary Council in which Berlin took part, treated Berlin as a state (Land) of the Federation (cf. Articles 23 and 144). Incorporation of West Berlin into the Federal

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public, however, could have been seized upon by the Soviets as grounds for denunciation of the above-cited protocol which provides for the joint occupation of Berlin, as the Western Powers did not acquire, under the Protocol, authority to dispose of the Western Sectors of Berlin. The Soviets would thus have acquired a legal position of some strength to justify action terminating our rights of access to Berlin. These considerations required the Western Powers to limit the relationship between West Berlin and the Federal Republic.

In their letter of May 12, 1949 approving the Basic Law, the three Military Governors stipulated: "A ... reservation concerns the participation of Greater Berlin in the Federation. We interpret the effects of Articles 23 and 144 (2) of the Basic Law as constituting acceptance of our previous request that while Berlin may not be accorded voting membership in the Bundestag or Bundesrat nor be governed by the Federation she may, nevertheless, designate a small number of representatives to attend the meetings of these legislative bodies."

On May 14, 1949 the Allied Kommandatura issued a Statement of the Principles Governing the Relationship between the Allied Kommandatura and Greater Berlin, the Berlin counterpart of the Occupation Statute. Paragraph 2 of the statement explained that "... the Military Governors have not been able, because of the special circumstances of Berlin, to agree at this time that Berlin should be included as a Land in the initial organization of the German Federal Republic ..."

The Berlin Constitution of 1950 contains provisions that "Berlin is a Land of the Federal Republic of Germany" (Article 1, paragraph 2) and "The Basic Law and the Laws of the Federal Republic of Germany are binding on Berlin" (Article 1, paragraph 3) as well as provisions (Article 87) for the application of Federal legislation in Berlin. In its order (BK/O (50) 75) of August 29, 1950 approving the Berlin Constitution, the Allied Kommandatura suspended paragraphs 2 and 3 of Article 1 and added "Article 87 is interpreted as meaning that during the transitional period Berlin shall possess none of the attributes of a twelfth Land. The provisions of this Article concerning the Basic Law will only apply to the extent necessary to prevent a conflict between this law and the Berlin Constitution. Furthermore, the provisions of any Federal law shall apply to Berlin only after they have been voted upon by the Chamber of Deputies (Abgeordnetenhaus) and passed as a Berlin law."

There is a divergence in Allied and German positions as to the effect of these reservations. The Three Powers have generally taken the position that Berlin is not a Land of the Federal Republic because of the limitations which ensue from the nature of Allied occupation rights in Berlin. The preponderance of German opinion is that Berlin is already a Land of the Federal Republic and that, though it cannot exercise those functions which the Three Powers have specifically prohibited, only removal of the Allied reservations is required for Berlin's full accession to the Federation. The distinction between these two points of view has not thus far had any important practical consequences.

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The close relationship which has developed between the Federal Republic and Berlin was recognised in Article 6 of the Convention on Relations between the Three Powers and the Federal Republic (1954) which reads: "The Three Powers will consult with the Federal Republic in regard to the exercise of their rights relating to Berlin. The Federal Republic, on its part, will co-operate with the Three Powers in order to facilitate the discharge of their responsibilities with regard to Berlin."

Berlin's Role in Federal Government

In the past ten years, Berlin's observers in the Federal Parliament have come to play a role somewhere between that anticipated in the Basic Law and that circumscribed by the Military Governor's letter. Berlin now has delegations of normal size to both the Bundesrat and the Bundestag and these delegations are composed according to proportional party strengths. Berlin does not participate in Bundestag elections, however, its delegates being selected by the Abgeordnetenhaus rather than elected by the population at large. In both houses, Berlin's votes are cast and recorded separately when votes are taken by written ballot but they do not affect the passage or rejection of a bill. Nonetheless, Berlin delegates participate in discussions and debates, introduce bills, and have full voting rights in committees and in the Joint Consultative Committee. In addition, there appear to be no restrictions on their functioning as leaders in the two houses; Governing Mayors of Berlin have served as Presidents of the Bundesrat (Suhr and Brandt) and a Berliner is majority leader in the Bundestag (Krone). Berliners, incidentally, have also served as cabinet ministers (Kaiser, Lemmer), as acting Federal President (Brandt), and in high positions in the Federal civil and foreign services.

Application of Federal Legislation in Berlin

Article IV of the Declaration on Berlin of May 5, 1955, which superseded the Statement of Principles and remains today the basic document governing the relations of the Allied Kommandatura and the German authorities in Berlin, provides that "The Allied Kommandatura will not, subject to the reservation of its own supreme authority, raise any objection to the adoption by Berlin under an appropriate procedure authorized by the Allied Kommandatura of the same legislation as that of the Federal Republic, in particular regarding currency, credit and foreign exchange, nationality, passports, emigration and immigration, extradition, the unification of the customs and trade area, trade and navigation agreements, freedom of movement of goods, and foreign trade and payments arrangements."

The "appropriate procedure" had earlier been established as the separate enactment of Federal legislation in Berlin as Berlin legislation and the separate promulgation of Federal regulations in Berlin as Berlin regulations. In 1951 (BR/O(31)56) the Allied Kommandatura permitted the institution of simplified procedure for the adoption of a Federal law by means of a "cover law" (Mantelgesetz) which states that the provisions of the Federal law are valid in Berlin.

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The Federal Government's attitude towards certain problems of Berlin-Federal Republic relations has been influenced in part by party political considerations. The Federal Government's attitude toward the participation of Berlin in the Bundestag elections of 1953 and 1957, toward Berlin voting rights in the Bundestag and Bundesrat, and toward the holding of the 1959 Presidential election in Berlin was conditioned by the fact that the SPD is Berlin's strongest party.

Despite the care with which the basic authority and the symbols of the occupation regime have been maintained, it must be recognized that the relationship between the Federal Republic and Berlin has become so great that the relationship itself must be regarded as a part of the "status" of Berlin in the broader sense. The Soviet Union is unquestionably aware that the continuance of the ties with the Federal Republic are as indispensable for the maintenance of West Berlin's security and freedom as is the physical protection afforded by the continued presence of the Allied Forces. It is no doubt this realization, more than legal considerations or vestiges of respect for four-power agreements, which accounts for the incessant Communist propaganda campaign against Berlin's association with the Federal Republic.

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Under this procedure, Berlin has, during the past ten years, adopted virtually all Federal laws except those pertaining to defense matters. Federal laws which are meant to apply to Berlin contain a "Berlin clause" to this effect: Federal legislation the adoption of which would not be compatible with Berlin's status omits the Berlin clause. Since 1952 Berlin has been required by the provisions of the Law on the Position of Land Berlin in the System of the Federal Finance Administration (the so-called "Third Transfer Law") to adopt within a fixed period any Federal law which contains a Berlin clause and which involves expenditures. Berlin's failure to do so would theoretically jeopardize Federal financial support for the city.

All Berlin legislation, including Federal legislation adopted for Berlin, is reviewed by the Allied Kommandatura. Over the years the procedures for this review have been progressively simplified and formal prior notice of intention to legislate in certain fields is no longer required. Close and cordial relationships among the Allied, the Federal German, and the Berlin authorities plus a common interest in maintaining the status of Berlin and minimizing occurrences which the Soviets might seize as pretexts for harassment has made it possible to eliminate almost entirely the necessity of amending or nullifying legislation. In addition to the formal procedures for legislative review, there has been in effect since 1955 an informal consultation procedure under which the Berlin Senator for Federal Affairs informs the Allied Kommandatura regarding Federal bills containing a Berlin clause which might impinge on Allied rights or fields of special interest as soon as the bills are introduced into the Parliament. Any amendments necessary to assure the compatibility of the legislation with the special status of Berlin can thus be worked out in quadripartite consultations. One of the fora for such consultations is the Quadripartite Committee in Bonn on which the Federal Government, but not the Berlin Senat, is represented.

Berlin's Foreign Relations

The situation with respect to Berlin's participation in Federal treaties is analogous to that for the application of Federal laws. The Three Powers have permitted the Federal Republic to represent Berlin abroad since 1949. A special procedure for Berlin's inclusion in treaties of the Federal Republic was worked out by the Federal Government, Berlin, and the Three Powers in 1952 (BKG/L(52)6). Federal treaties to be applicable to Berlin (as are practically all except those pertaining to defense matters) contain a special Berlin clause, require separate ratification by the Berlin Abgeordnetenhaus through the Mantelgesetz procedure, and are reviewed by the Allied Kommandatura.

In addition, although West Berlin is a participant in the European economic communities as a part of the same economic, customs, and fiscal area as the Federal Republic, specific reservations were made to ensure that the occupation powers were not superseded by the authority of the supra-national agencies.

Neither

Neither the Federal Republic nor Berlin recognize any division of German citizenship; West Berliners travelling abroad carry Federal Republic passports (as do also those residents of the Soviet-controlled area who apply for them in the Federal Republic or West Berlin).

Federal Agencies in Berlin

The adoption of Federal legislation in Berlin and the consequent development of close administrative, judicial, and fiscal relationships between Berlin and the Federal Republic necessarily led to the operation of Federal agencies in Berlin. The Allied Kommandatura clarified the relationships arising from the constitutional status of Berlin in 1951 (BK/O(51)63) as follows: "In connection with the enactment by Berlin of Federal legislation, ... the powers and jurisdiction of the Occupation Authorities shall not be affected by any delegation of authority to officials or agencies outside Berlin made by any Berlin authority. Activities in Berlin of such officials or agencies, including activities under their instructions (the authority in Berlin of all such officials and agencies being derived from the Berlin Legislature or Government), shall be subject to the same powers and jurisdiction of the Occupation Authorities as are the activities of the Berlin authorities."

Federal agencies have since played an ever increasing role in Berlin affairs, but it is clearly understood that the authority of the Allied Kommandatura is overriding in case of conflict and, in fact, no difficulties have arisen on this score.

The Federal Government is represented in Berlin by a Commissioner for Berlin (Vockel) who has under him a representative of each of the Federal ministries except the Ministry of Defense. (Berlin, for its part, has a Senator for Federal Affairs (Klein), who maintains an office in Bonn.)

Federal Financial Assistance

The financial relations of the Federal Republic and Berlin are a life or death matter for the city. The introduction of the reformed West German currency into Berlin was, it will be recalled, the chief pretext seized by the Soviets for the split of the city and for the blockade. The integration of the fiscal systems of Berlin and the new Federal Republic began immediately and was formalized in the Third Transfer Law of 1952. Berlin's is a deficit economy which can only be sustained by outside aid. With the exception of a token contribution from the United States, this aid comes from the Federal Republic. The Federal Republic makes good the annual deficit in the Berlin budget; the precise amount is negotiated from year to year by the Senat and the Federal Finance Ministry and in recent years has been about DM(W) 1 billion per annum. The Federal Government also assists Berlin through tax

preferences,

ences, subsidization of preferential shipping rates, and the placing of orders in Berlin. There is no doubt that the moral support of the Federal Republic also contributes greatly to keeping Berlin's economy as sound as it is.

Berlin as National Capital

In the past few years, more and more stress has been put on Berlin's role as the future capital of a reunited Germany and thus, in a sense, as the capital of the only Government which now represents the German people, the Federal Republic. Though in large measure a question of sentiment and symbol, this aspect of the relationship of the Federal Republic and Berlin is taken very seriously by many Germans, particularly those of Berlin and the Soviet-controlled area. Suggestions have been made from time to time that the Federal Government transfer its seat from Bonn to Berlin. The Federal Government has turned down these suggestions for practical and security reasons, avoiding the probably unanswerable question how such a development would be reconciled with Berlin's present status. Nonetheless, a gradual transfer to Berlin of Federal agencies below the ministry level has taken place. For example, the Supreme Administrative Court of the Federal Republic is located in Berlin. Today there are more Federal civil servants employed in Berlin than in Bonn, although Bonn of course remains the seat of government. The Federal Government has undertaken a special building program in Berlin for government offices (for example, the old Reichstag building is being restored) and housing for Federal officials (including a palace for the Federal President). The Bundesversammlung now hold regular annual meetings in Berlin. The Bundesversammlung has met in Berlin twice to elect the Federal President. High Federal officials are frequent visitors on the Berlin scene and conduct themselves there precisely as they would in any Land of the Federal Republic. The type of activity described in this paragraph, which pertains to the governing of the Federal Republic as a whole rather than to the governing of Berlin proper, is not subject to any formal review by the Allied Kommandatura but could theoretically be restricted by the Occupying Powers if they felt it to be incompatible with the city's security or status.

Limitations on Berlin-Federal Republic Relations

It is perhaps easiest to describe the extent of Berlin's association with the Federal Republic by listing the matters which distinguish Berlin from the Laender of the Federation. These have become few in number but they remain important in nature. They are:

- The continued presence of the Allied Forces as occupiers rather than on a contractual basis;
- The real, if quietly exercised, supreme authority of the Allied Kommandatura;
- The continuation in force of a body of occupation legislation;

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- The control of the Berlin Police by the Allied Commandants;
- The vestiges of four-power arrangements for Berlin, e.g. those governing access;
- The exclusion of Berlin from the Federal Republic's defense organization, because Berlin is not part of the Federal territory and its security is exclusively an Allied concern;
- The limitations on Berlin's participation in the Federal Parliament;
- the special procedures for the application of Federal legislation and treaties and the limitation on the independence of Federal agencies in Berlin;
- The lack of Federal Constitutional Court jurisdiction over Berlin (all other Federal courts do have jurisdiction); and
- The special financial arrangements between Berlin and the Federal Republic.

Conclusion

In sum, the fundamental status of Berlin is unchanged but Berlin has been permitted to develop its self-government to the greatest extent compatible with that status. The most important feature of that development during the past ten years has been an ever more intimate association with the Federal Republic. This association has been tolerated, and to a large degree fostered, by the Three Powers. It is a natural consequence of a situation in which the democratically constituted Federal Republic is regarded as the interim representative, in international relations, of the entire German people and the freely-elected Government of Land Berlin, although its effective authority extends only to the Western Sectors, is regarded as the sole legitimate government in Berlin.

Concurrence

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PROBLEMS OF BERLIN-FEDERAL REPUBLIC RELATIONS

There is obviously a point at which the development of the relationship between the Federal Republic and Berlin and the extension of the Federal Republic's activities in Berlin would raise the question whether the occupation regime was still a reality or had become a mere "legal fiction." This risk is all the greater because the occupation regime is an anachronism, albeit a necessary one. If such a point were reached, Soviet arguments that the occupation regime in Berlin has lost its legal basis would be more difficult to combat.

This problem has been constantly in the minds of the Allied and German officials dealing with Berlin, but the seriousness with which it is viewed has, at least on the German side, varied in direct proportion to the extent of Soviet pressures on Berlin. Since the Soviet threats of November 1958, for example, both the Federal Government and the Berlin Senat have generally refrained from pushing for any further integration of Berlin into the Federal Republic. The Federal Government, as in the issue of the 1959 Presidential elections, has even given indications of desiring to put the process into reverse and to de-emphasize the relationship.

Judgments have varied on how much further the process of integration might safely be carried. In 1956 the Allied Kommandatura agreed to grant a Senat request for a further simplification of the procedure for the adoption of Federal legislation by a "global law" which would eliminate the need for a separate Berlin legislative act for each law and would require only a separate promulgation in Berlin. The Senat later decided against such a change, however. In tripartite discussions, the United States and the United Kingdom have taken the position that the jurisdiction of the Federal Constitutional Court might, subject to certain safeguards, be extended to Berlin. France, however, was opposed. There is some variance of opinion within Allied circles as to whether the Military Governors' letter of 1949 might be modified to permit the direct election of Berlin's Bundestag delegation and full voting rights for Berlin's delegations in the Bundestag and the Bundesrat. In this connection it should be noted that the Soviet reaction has been inconsistent. Thus, on the point of holding the Federal Presidential Elections in Berlin, the Soviet made no comment on the 1955 election but threatened and blustered at length about the 1959 election.

Both the Berlin Senat and the Federal Government have tended, when it was convenient for them to do so, to use the rights of the occupation powers as an excuse for not exercising the authority which the occupation authorities have made available to them. For example, some occupation legislation has been left on the books in Berlin largely because the Federal and Berlin Governments did not want to take the onus of passing unpopular bills to supplant it.

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